No. 87-650

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

WALTER L. NIXON, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Walter L. Nixon, Jr. makes the following reply to the Brief for the United States:

1. The government's brief deals only glancingly with the key legal issue whether a perjury conviction may be based upon a response to an ambiguous question when the response was literally true under a reasonable understanding of the question. This issue was reserved in *Bronston v. United States*, 409 U.S. 352 (1973), and there is a square conflict among the circuits on it. *See* Petition for Certiorari, at 15-16.

The government incorrectly implies that the courts that have reversed perjury convictions based on ambiguous

questions have adopted the Second Circuit's view that the question must be "fundamentally ambiguous." *See* Gov't Br. at 11, discussing *United States v. Lighte*, 782 F.2d 367 (2d Cir. 1986). In fact, none of the other four circuits and two states has adopted that "fundamentally ambiguous" standard. *See* cases cited on pp. 15-16 of Petition for Certiorari. Similarly, the government incorrectly suggests that the Second Circuit's standard was elucidated by the D.C. Circuit in *United States v. Chapin*, 515 F.2d 1274, 1280 (D.C. Cir), *cert. denied*, 423 U.S. 1015 (1975). In fact, those two courts are in direct conflict on this issue. *Chapin* held that a jury may convict for perjury even when the question "may have a number of interpretations," and thus *Chapin* allowed "the jury to determine that the question *as the defendant understood it* was falsely answered." *Id.* (emphasis in original). The Second Circuit in *Lighte* refused to allow the jury to make that determination if the question was fundamentally ambiguous.

2. The government attempts to portray the Petition as presenting only a factual dispute over Count III of the indictment. The government argues that the full context of Nixon's testimony makes clear that Nixon could not have understood the term "Drew Fairchild's case" to refer to federal (as opposed to state) proceedings involving Drew Fairchild. Gov't Brief, at 11-13. But it is the government that ignores the full context of Nixon's testimony.

The investigation of Nixon was prompted by an allegation that Nixon had steered the Drew Fairchild case from federal to state authorities. Tr. 316-18, 347. When Nixon was interviewed by the prosecutor in April of 1984, the prosecutor stated that he was investigating how Drew Fairchild's case "got passed" from federal to state authorities. Pet. App. 46a-47a. The interview returned to that subject several times. *Id.* at 49a, 50a, 52a.

Consequently, when Nixon was asked before the grand jury if he had discussed "Drew Fairchild's case" with state prosecutor Holmes, Nixon reasonably understood the question to address whether Nixon had discussed with Holmes how the federal case was steered into state hands. Nixon told the grand jury that the federal courts have no involvement in state prosecutions, and then added (in a passage ignored by the government's brief) that the federal courts also have no involvement in federal prosecutorial decisions. Pet. App. 57a-59a. The entire sequence of testimony reflects Nixon's understanding—first established by the prosecutor's own statements in the April interview—that the prosecutor was asking about how "Drew Fairchild's case" "got passed" from federal to state authorities.

Finally, the government argues that the term "Drew Fairchild's case" could not have referred to any federal action "because at the time of petitioner's grand jury testimony there never had been a 'Drew Fairchild case' in federal court." Gov't Br. at 12. This contention is contrary to the common parlance of attorneys and is contradicted by the prosecutor's statements in the April 1984 interview.

The federal prosecutor told Nixon in April that the Drew Fairchild prosecution "originally . . . was a federal *case*," Pet. App. at 46a, that Drew's "*case* got picked up" by the state prosecutor, *id.* at 50a, and that sometime between November of 1980 and August 1981, "that *case*, on DREW FAIRCHILD and another defendant who was a fugitive, was passed down . . . ." *Id.* The prosecutor added that "[Federal District] Judge COX never had DREW's *case*, . . . The *case* was never indicted [in federal court]." *Id.* at 51a (emphases supplied). Thus, in five separate instances the federal prosecutor used the term "case" to describe federal pre-indictment activities concerning Drew Fairchild, and that

is precisely what Nixon understood that term to mean when he testified before the grand jury.[1]

3. The Petition's second question concerns whether the government proved the truth assertion of Count IV, that Nixon sought to influence state prosecutor Holmes' handling of Drew Fairchild's case. The government now argues that such proof was established by (i) Nixon's call to Wiley Fairchild to describe Drew's preexisting plea agreement and (ii) Holmes' statement to Wiley that Holmes does whatever Nixon asks. Gov't Br. at 14. But Nixon's description to Wiley of the preexisting plea agreement cannot prove that Nixon attempted to influence Holmes, particularly since Nixon had no influence on the plea agreement which had been implemented when Drew Fairchild pled guilty at least four months earlier. And Nixon's flat disavowals of an intent to influence Holmes—which are established through the testimony of the government's own witness, Holmes—cannot be contradicted by Holmes' admittedly "misleading" statement to Wiley that he does whatever Nixon asks. Tr. 740.[2]

4. On the third question, concerning the Fifth Circuit's en banc procedures, the government offers no reasoning or analysis, but only the flat *ipse dixit* that the

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[1] On an unrelated point, the government misstates the record when it suggests that "some" of Nixon's investments with Wiley Fairchild "were made after Drew Fairchild's troubles began." Gov't Br. at 3, n.3. It is uncontradicted that all three investments were concluded in February 1980, Tr. 1044, 1118, 1053, 593-94, while Drew Fairchild's legal problems did not arise until August 1980.

[2] The government also misstates Holmes' testimony when it asserts that, while visiting Holmes, Nixon "reiterated that he was simply 'put[ting] in a good word' and not asking Holmes to do anything." Gov't Br. at 4. According to Holmes, however, Nixon stated only that Wiley Fairchild had asked him to put in a good word. Pet. App. at 16a. No one ever testified that Nixon stated —much less reiterated—that he actually was "put[ting]" in a good word. Pet. App. at 15a-16a.

"en banc procedure that Congress has authorized, therefore, is fundamentally different from the right to appeal." Gov't Br. at 17. En banc review, of course, differs from direct appeal because it is discretionary. But that distinction is irrelevant to petitioner's claim that he is entitled to a fair opportunity to win en banc review, just as he is entitled to a fair direct appeal. In this case, only three Fifth Circuit judges (two of whom had served on the original panel) were not recused from the en banc proceeding. Because eight votes were needed for Nixon to win en banc review, he was denied his constitutional right to a fair opportunity to win en banc review.

CONCLUSION

For all of these reasons, and the reasons stated in the initial petition for certiorari, the petition should be granted.

Respectfully submitted,

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